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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 OCULU, LLC,) Case No. SACV 14-0196-DOC (JPRx)
12)
13 Plaintiff,)
14 vs.) REPORT AND RECOMMENDATION OF U.S.
15) MAGISTRATE JUDGE
16)
17 OCULUS VR, INC., et al.,)
18)
19 Defendants.)
20 _____)

21 This Report and Recommendation is submitted to the Honorable
22 David O. Carter, U.S. District Judge, under 28 U.S.C. § 636 and
23 General Order 05-07 of the U.S. District Court for the Central
24 District of California.
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26
27 PROCEEDINGS

28 On March 2, 2015, Defendant Oculus VR, Inc., filed a motion
for contempt and sanctions.¹ Defendant asserts that Plaintiff
Oculus, LLC, failed to produce (1) an Excel spreadsheet that
tracked free-trial customer signups; (2) an electronic MySQL

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30 ¹Under Judge Carter's July 21, 2014 scheduling order,
discovery closed on February 24, 2015.

1 database showing people who had signed up for free or paid
2 accounts on Plaintiff's website; (3) emails Plaintiff's vice
3 president of sales and former president, Robert Ardell, received
4 each time a free or paid membership was generated at oculu.com;
5 (4) an email sent to Plaintiff's chief technology officer, David
6 Winters, from an attorney of one of Plaintiff's clients, in which
7 the attorney commented on his confusion between the parties'
8 products; and (5) an intern's PowerPoint presentation explaining
9 reasons for choosing the name "Oculu" and how it was different
10 from "Oculus." (Mem. P. & A. Supp. Mot. Contempt & Sanctions at
11 5-6, 9-14.) Defendant further contends, based on deposition
12 testimony that the MySQL database was sometimes purged of data,
13 that Plaintiff "may have engaged in spoliation of evidence."
14 (Id. at 6, 14.) Finally, Defendant argues that Plaintiff failed
15 to produce a privilege log or "identify a single privilege
16 communication that has been withheld." (Id. at 19.)

17 Defendant asks that the Court find Plaintiff in violation of
18 its obligations under the Federal Rules and the undersigned's
19 December 2, 2014 and January 15, 2015 orders. It asks that the
20 Court preclude Plaintiff from offering any argument, evidence, or
21 testimony regarding (1) its client's attorney's "confusion"
22 concerning Plaintiff and Defendant; (2) its free-trial and paid-
23 subscription customers or conversion of free-trial customers to
24 paid customers; and (3) its "actual damages theory (namely that
25 Defendant's conduct allegedly caused a reduction in free trials
26 and paid conversions)," or, alternatively, find that Defendant is
27 entitled to an adverse inference that the data would contradict
28 Plaintiff's conclusions and expert-witness testimony regarding

1 damages. (Id. at 23-24.) Defendant further asks the Court to
2 find that Plaintiff's failure to produce a privilege log waives
3 any privilege "as to its written communications with former or
4 current counsel relating to its trademark application, its
5 decisions whether to enforce its alleged trademark rights, its
6 demand letter to Defendant, the allegations in its Complaints in
7 this case, and its press releases relating to this litigation"
8 and order Plaintiff to "produce all such communications." (Id.)
9 Finally, Defendant asks for reasonable attorney's fees and costs
10 in bringing the motion. (Id.)

11 On March 9, 2015, Plaintiff filed opposition to the motion,
12 and on March 16, Defendant filed a reply. On March 27, 2015,
13 Judge Carter referred the matter to this Court for a report and
14 recommendation. For the reasons stated below, the Court
15 recommends that the motion be granted in part and denied in part.

16 **DISCUSSION**

17 I. Meet and Confer

18 As an initial matter, Plaintiff contends that Defendant's
19 motion must be dismissed because Defendant failed to meet and
20 confer as required by Local Rule 7-3. (Opp'n Mot. Contempt at
21 3.) Local Rule 7-3 states that

22 counsel contemplating the filing of any motion shall
23 first contact opposing counsel to discuss thoroughly,
24 preferably in person, the substance of the contemplated
25 motion and any potential resolution. The conference
26 shall take place at least seven (7) days prior to the
27 filing of the motion. If the parties are unable to reach
28 a resolution which eliminates the necessity for a

1 hearing, counsel for the moving party shall include in
2 the notice of motion a statement to the following effect:

3 "This motion is made following the conference of counsel
4 pursuant to L.R. 7-3 which took place on (date)."

5 On February 19, 2015, 11 days before filing the instant motion,
6 Defendant's counsel emailed and mailed a letter to Plaintiff's
7 counsel requesting a meet-and-confer regarding the motion.

8 (Peterson Decl., Ex. 3.) Between February 23 and 27, 2015,
9 counsel for both parties exchanged several emails regarding the
10 evidence at issue. (Id., Ex. 4; Taillieu Decl., Ex. 3.) On
11 March 2, 2015, Defendant filed the instant motion.

12 Defendant sufficiently complied with Local Rule 7-3 by
13 sending the meet-and-confer letter 11 days before filing its
14 motion and discussing the disputed issues over email in the
15 ensuing days. See JAT Wheels Inc. v. JNC Wheel Collection, No.
16 CV 14-04898 JVS (MRWx), 2014 WL 4568323, at *2 n.1 (C.D. Cal.
17 Sept. 8, 2014) (finding email exchange between counsel over two
18 days discussing basis for motion sufficient to satisfy Local Rule
19 7-3's meet-and-confer requirement); see also Hoffman v. Constr.
20 Protective Servs., Inc., 541 F.3d 1175, 1179 (9th Cir. 2008) (as
21 amended) (finding "motion relating to sanctions pursuant to Rule
22 37" not subject to Local Rule 37-1's conference requirement). It
23 also noted in its Notice of Motion that it had attempted to
24 comply with Local Rule 7-3. (See Notice Contempt Mot. at 4.) As
25 such, dismissal of Defendant's motion based on its alleged
26 failure to meet and confer is not warranted.

1 II. Plaintiff's Compliance with the Court's Orders and Federal
2 Rule of Civil Procedure 26

3 Defendant contends that Plaintiff violated the undersigned's
4 December 2 and January 15 discovery orders "through failure to
5 produce documents it was ordered to produce, and by its continued
6 failure to produce documents in native format." (Mem. Contempt
7 Mot. at 11.) Defendant further contends that Plaintiff "violated
8 its Rule 26(a) obligations by not producing documents and data
9 'bearing on the nature and extent' of Plaintiff's claimed damages
10 (i.e. newly-revealed free trial and conversion data)." (Id.)

11 A. Applicable law

12 Federal Rule of Civil Procedure 26 requires a party "to make
13 certain initial disclosures to [other parties] 'without awaiting
14 a discovery request.'" R & R Sails, Inc. v. Ins. Co. of Pa., 673
15 F.3d 1240, 1245 (9th Cir. 2012) (quoting Fed. R. Civ. P.
16 26(a)(1)(A)). Under Rule 26(a)(1)(A)(iii), those initial
17 disclosures must include

18 a computation of each category of damages claimed by the
19 disclosing party--who must also make available for
20 inspection and copying as under Rule 34 the documents or
21 other evidentiary material, unless privileged or
22 protected from disclosure, on which each computation is
23 based, including materials bearing on the nature and
24 extent of injuries suffered

25 See also Fed. R. Civ. P. 26 advisory committee's note to 1993
26 amends. Rule 26(e)(1)(A) further requires disclosing parties to
27 supplement their prior disclosures "in a timely manner" when a
28 prior response is "incomplete or incorrect."

1 Rule 37(c)(1) "forbid[s] the use at trial of any information
2 required to be disclosed by Rule 26(a) that is not properly
3 disclosed." Hoffman, 541 F.3d at 1179 (internal quotation marks
4 omitted). Such exclusion of evidence is appropriate unless the
5 failure to disclose was "substantially justified or . . .
6 harmless." Fed. R. Civ. P. 37(c)(1); R & R Sails, 673 F.3d at
7 1246. "The party facing sanctions bears the burden of proving
8 that its failure to disclose the required information was
9 substantially justified or is harmless." R & R Sails, 673 F.3d
10 at 1246. In addition to or instead of an exclusionary sanction,
11 the court may order payment of reasonable expenses, including
12 attorney's fees; inform the jury of the party's failure; or
13 "impose other appropriate sanctions, including any of the orders
14 listed in Rule 37(b)(2)(A)(i)-(vi)." Fed. R. Civ. P.
15 37(c)(1)(C).

16 Under Rule 37(b)(2)(A), when a party fails to obey an order
17 to provide discovery, a court may sanction it by issuing "just
18 orders," including

- 19 (i) directing that the matters embraced in the order or
20 other designated facts be taken as established for
21 purposes of the action, as the prevailing party claims;
22 (ii) prohibiting the disobedient party from supporting or
23 opposing designated claims or defenses, or from
24 introducing designated matters in evidence;
25 (iii) striking pleadings in whole or in part;
26 (iv) staying further proceedings until the order is
27 obeyed;
28 (v) dismissing the action or proceeding in whole or in

1 part;

2 (vi) rendering a default judgment against the disobedient
3 party; or

4 (vii) treating as contempt of court the failure to obey
5 any order except an order to submit to a physical or
6 mental examination.

7 Rule 37(b)(2)(C) provides that "[i]nstead of or in addition to"
8 the sanctions under subsection (A), "the court must order the
9 disobedient party, the attorney advising that party, or both to
10 pay the reasonable expenses, including attorney's fees, caused by
11 the failure, unless the failure was substantially justified or
12 other circumstances make an award of expenses unjust."

13 "Rule 37(b)(2) contains two standards – one general and one
14 specific – that limit a district court's discretion." Ins. Corp.
15 of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 707
16 (1982). First, any sanction must be "just"; second, it must be
17 "specifically related" to the claim or defense at which the
18 discovery was directed. Id.; see also Moe v. Sys. Transp., Inc.,
19 No. CV 09-157-M-DWM-JCL, 2010 WL 4736292, at *2 (D. Mont. Nov.
20 16, 2010). Sanctions may be appropriate even if the offending
21 party ultimately complied with the discovery order. Fair Hous.
22 of Marin v. Combs, 285 F.3d 899, 906 (9th Cir. 2002).

23 B. Discussion

24 1. Excel Spreadsheet, MySQL Database, and Sign-Up
25 Emails

26 Defendant contends that sanctions are warranted because
27 Plaintiff failed to produce: (1) an Excel spreadsheet tracking
28 individuals who signed up for free trials on its website; (2) an

1 electronic MySQL database that "tracks every person who has
2 signed up for an account with Plaintiff's website (whether free
3 trial or paid subscription)"; and (3) emails Ardell received each
4 time a consumer signed up on oculu.com for a free trial or paid
5 membership.² (Mem. Contempt Mot. at 5-6.) Defendant contends
6 that it first learned of these documents during various
7 depositions, and that they are responsive to RFP numbers 131,
8 132, 135, and 136, which were the subject of the undersigned's
9 January 15 Order granting Defendant's second motion to compel.
10 (Id.) Defendant further contends that these documents are "of
11 central importance to Plaintiff's actual damages theory, which
12 relies on an alleged loss of traffic to its website, a loss of
13 free trial sign-ups, and supposedly, a lower conversion of free
14 trial customers to paying ones." (Id. at 6.)

15 Indeed, Plaintiff appears to have violated the January 15
16 _____

17 ²Defendant contends that Plaintiff violated the Court's orders
18 "by its continued failure to produce documents in native format."
19 (Mem. Contempt Mot. at 11.) To the extent Defendant refers to the
20 emails sent to Ardell when a person registered on oculu.com for a
21 free or paid membership (see id. at 12 (contending that free-trial
22 and paid-account sign-up emails "were not timely produced, let
23 alone in native format")), sanctions are not warranted because
24 Plaintiff apparently has now provided them to Defendant in native
25 format (see Peterson Conf. Reply Decl., Ex. 22 at 597 (John Cecil
26 testimony that emails had been provided in native format)). To the
27 extent Defendant refers to emails that were previously produced in
28 PDF format and were the subject of Defendant's December 24, 2014
motion for sanctions (Mem. Contempt Mot. at 12 (arguing that Ardell
"testified that he maintained all of his emails in native format,
but — as addressed in Defendant's [December 24] Motion for
Sanctions — Plaintiff converted the emails and produced them in PDF
(non-native format)" (citation omitted))), the undersigned already
declined to award sanctions based on Plaintiff's failure to produce
the emails in native format in her March 3, 2015 Order (see Mar. 3,
2015 Order at 2-3). Defendant has proffered no reason for the
Court to revisit that Order here.

1 Order in failing to produce the Excel spreadsheet, MySQL
2 database, and sign-up emails. In its December 24, 2014 motion to
3 compel, Defendant argued that Plaintiff should be ordered to
4 produce documents

5 showing Plaintiff's website's conversion rate – meaning
6 the rate at which consumers visit Plaintiff's oculu.com
7 website and become paying customers (Request No. 131);
8 the conversion rate of customers who sign up for a "free
9 trial" and then become paying customers (Request No.
10 132); the number of customers each year who sign up for
11 Plaintiff's various membership plans, which carry
12 different monthly fees (Request No. 135); and documents
13 showing the average time a paying customer remains a
14 customer of Plaintiff (Request No. 136).

15 (Dec. 24, 2014 J. Stip. Re Mot. Sanctions & Mot. Compel at 16;
16 see also Dec. 24, 2014 Peterson Decl., Ex. 1 (Pl.'s Resps. Second
17 Set RFPs).) On January 15, 2015, the undersigned granted
18 Defendant's motion to compel, ordering Plaintiff to "produce all
19 documents responsive to RFP Nos. 131, 132, 135, and 136" within
20 seven days of the date of the Order. (Jan. 15, 2015 Order at 2.)

21 Plaintiff's Excel spreadsheet, MySQL database, and sign-up
22 emails are responsive to RFP numbers 131, 132, 135, and 136, as
23 they show the names of customers who signed up for free or paid
24 subscriptions on oculu.com and resulting account information.
25 Although Plaintiff contends that the documents do not
26 independently show any "conversion rate" of free-trial customers
27 to paying customers (see Opp'n Mot. Contempt at 7-8, 10), they
28 can clearly be used to determine Plaintiff's conversion rate by

1 simply comparing the listed free-trial customers with the listed
2 paid-subscription customers. The Excel spreadsheet, MySQL
3 database, and sign-up emails are therefore among the data
4 "sufficient to show Oculu's conversion rate," as requested in
5 Defendant's RFPs, and should have been produced under the January
6 15 Order. (See Peterson Decl., Ex. 1 at 17-20 (Pl.'s Feb. 9,
7 2015 Supp. Resps. to RFP Nos. 131, 132, 135, & 136).)³

8 The data also should have been produced under Rule 26
9 because they underlie Plaintiff's calculation of damages.
10 Plaintiff's damages expert opined that Plaintiff lost revenue
11 because Defendant "crowd[ed] [Plaintiff] out of relevant search
12 engine results" and that Plaintiff "would have earned the lost
13 revenue by converting these missing inbound opportunities" into
14 accounts. (Peterson Conf. Decl., Ex. 14 at 11-12.) He asserted
15 that Plaintiff had previously "averaged approximately 100 free
16 trials each month, of which approximately 15 percent were
17 typically converted into ongoing customers with associated
18 revenue," but that after Defendant's mark became "widely known,
19 the number of free trials dropped to approximately 20 per month,"
20 equaling "360 lost accounts since [Defendant] became a sensation
21 in June 2012." (Id. at 12.) The expert calculated damages based
22 on those "missed free trial conversion opportunities."⁴ (Id.)

23
24 ³Because this exhibit is not sequentially paginated, the Court
25 uses the numbering provided by its Case Management/Electronic Case
26 Filing system.

27 ⁴Plaintiff's president, John Cecil, testified that the only
28 way to determine the number of free-trial signups would be to go
through the sign-up emails generated during a particular time
frame. (Peterson Conf. Reply Decl., Ex. 22 at 597-98.) Thus,

1 Thus, the information showing Plaintiff's free-trial and
2 paid-membership signups over time underlies Plaintiff's
3 calculation of damages and should have been produced.
4 Plaintiff's counsel's repeated representations during the
5 discovery process that the conversion rate was "irrelevant" only
6 makes his failure to produce even more egregious. (See Dec. 24,
7 2014 Mot. Sanctions J. Stip at 18; Dec. 24, 2014 Peterson Decl.,
8 Ex. A at 13-16 (Pl.'s Resp. RFPs).)

9 Plaintiff contends that sanctions are unwarranted because it
10 had believed that its production of its Quickbooks data "ended
11 the inquiry" into its free- and paid-subscription customers.
12 (Opp'n Mot. Contempt at 6-7.) But Plaintiff's president, John
13 Cecil, testified that the conversion rate for free-trial to
14 paying customers was not reflected in the Quickbooks data
15 (Peterson Conf. Reply Decl., Ex. 22 at 594) and that the only way
16 to determine how many people signed up for a free trial on
17 Plaintiff's website in a given month was to go through the sign-
18 up emails generated during that time frame (id. at 597-98).
19 Moreover, in its January 15 Order, the undersigned treated these
20 two issues separately, first ordering Plaintiff to produce the
21 Quickbooks data in response to Defendant's motion to enforce the
22 Court's December 2 Order (see Jan. 15, 2015 Order at 1 (granting

23 _____
24 although the expert stated that he obtained the numbers regarding
25 free trials from a PowerPoint presentation Cecil used to recruit
26 investors (Peterson Conf. Decl., Ex. 14 at 12 n.47 (citing document
27 with Bates stamp 0005811); Peterson Conf. Reply Decl., Ex. 22 at
28 620-23 (Cecil testimony regarding document with Bates stamp 5811)),
and from his own "discussions with Oculu management" (Peterson
Conf. Decl., Ex. 14 at 12 n.48), the original source could only
have been the sign-up emails.

1 "Defendant's motion to enforce the Court's December 2, 2014
2 Order, as follows: No later than seven days from the date of the
3 hearing, Plaintiff must produce its Quickbooks data files to
4 Defendant's counsel")) and then granting Defendant's second
5 motion to compel and ordering Plaintiff to produce "all
6 documents" responsive to RFP numbers 131, 132, 135, and 136
7 within seven days (id. at 2). Plaintiff's argument that he
8 believed the Quickbooks data would fully satisfy those RFPs is
9 not persuasive.

10 Plaintiff further contends that in any event, it has now
11 produced the Excel file, MySQL database, and sign-up emails and
12 its "early omission is not contemptible conduct." (Opp'n Mot.
13 Contempt at 8.) But that Plaintiff apparently eventually
14 produced the requested data does not preclude the imposition of
15 sanctions. See Combs, 285 F.3d at 906 ("Last-minute tender of
16 documents does not cure the prejudice to opponents nor does it
17 restore to other litigants on a crowded docket the opportunity to
18 use the courts.").

19 Plaintiff also argues that the Excel file was maintained on
20 a "decommissioned computer" and it was unaware it existed until
21 Ardell's deposition (Opp'n Mot. Contempt at 8), but given that
22 Plaintiff is by its own description a "small" organization
23 (Tailleau Decl. ¶ 31) and the Excel file was created by its vice
24 president, it is not persuasive that the spreadsheet would not
25 have been discovered during a diligent search and reasonable
26 inquiry for responsive documents. Moreover, Ardell testified
27 that the spreadsheet mainly listed information from the sign-up
28 emails he received (Peterson Conf. Decl., Ex. 11 at 98-101), and

1 he further testified that he assisted in responding to discovery
2 requests in this case by providing "every single email" he had to
3 Cecil in the form of a zip drive (see id. at 29-30, 32). Indeed,
4 Cecil apparently received or at least had access to those same
5 emails. (See Peterson Conf. Reply Decl., Ex. 22 at 597-98.)
6 That Plaintiff failed to produce that information, either in the
7 form of the Excel spreadsheet or the sign-up emails, tends to
8 show that its search for responsive documents was not diligent.

9 In sum, Plaintiff should be found to have violated its
10 discovery obligations and the January 15 Order by failing to
11 timely produce the Excel spreadsheet, MySQL database, and sign-up
12 emails.

13 2. Email Regarding "Confusion"

14 Defendant points out that Plaintiff's chief technology
15 officer, Winters, testified that an attorney for one of
16 Plaintiff's clients "sent an email to Mr. Cecil and Mr. Winters,
17 in which the attorney supposedly commented about confusion over
18 VR goggles," which is one of Defendant's main products. (Mem.
19 Contempt Mot. at 5; Peterson Conf. Decl., Ex. 13 at 114-15, 118-
20 19 (Winters testimony).) Defendant contends that Plaintiff
21 "previously responded that it had produced all documents
22 responsive to RFP Nos. 93-98 (emails and documents relating to
23 alleged confusion), which were subject to the Court's December 2
24 Order granting Defendant's Motion to Compel," and that the
25 document still has not been produced. (Mem. Contempt Mot. at 5
26 (citations omitted); see also Nov. 11, 2014 Mot. Compel at 16-
27 17.)

28 Defendant is correct that Winters testified that a

1 representative of a customer – apparently Canon – emailed Cecil
2 and Winters in the first half of 2014, wanting more information
3 “on why we were releasing virtual reality goggles.” (Peterson
4 Conf. Decl., Ex. 13 at 118-19.) He testified that the confusion
5 “delayed our approval and sort of jeopardized us getting our
6 first project with” that customer. (Id. at 115.) Winters spoke
7 with Cecil about the email and Cecil responded to it; Winters was
8 not copied on any reply email and did not know whether Cecil
9 responded by phone or email. (Id. at 120.)

10 Plaintiff acknowledges that the Winters email would have
11 been “relevant” and responsive to the cited RFPs but asserts that
12 it conducted a thorough search and review and “to the extent that
13 it ever had that email, [it] was not found and as such it was not
14 turned over.”⁵ (Opp’n Mot. Contempt at 5; Taillieu Decl. ¶ 19.)⁶

16 ⁵In a response to an interrogatory asking Plaintiff to
17 “[d]escribe in detail all oral or written communications from any
18 customer or potential customer of [P]laintiff in which the customer
19 mentioned Defendant or Defendant’s trademark,” Plaintiff stated
20 that

21 . . . Mr. Cecil was negotiating a contract with Canon,
22 which was his single largest client. Canon was utterly
23 confused as to why Canon was spending money for virtual
24 reality. The reason for the confusion was that the
25 lawyer in charge of negotiating the contract had been on
26 [Defendant’s] website and was asking Mr. Cecil about
27 goggles.

28 (Taillieu Decl., Ex. 7 at 3-4.) Plaintiff did not identify any
emails from Canon regarding that incident, however. (Id.)
Winters, moreover, testified that he didn’t “recall having any
phone conversation” with a Canon representative about the issue and
remembered only the email. (Peterson Conf. Decl., Ex. 13 at 118.)

⁶In his declaration, Plaintiff’s counsel states that he has
attached to his declaration as Exhibit 6 “the final supplemental

1 It argues that "[n]ot turning over a document that one does not
2 have is not a violation of a court order." (Opp'n Mot. Contempt
3 at 5-6.) But as Defendant contends (Reply at 11), Plaintiff had
4 a duty to preserve that email, as it was received either after or
5 shortly before this lawsuit was filed, in February 2014.⁷
6 Indeed, Plaintiff sent Defendant a letter on January 6, 2014,
7 demanding that it stop using the Oculus trademark and stating
8 that if the matter was not resolved, it would "seek relief . . .
9 through the Court." (See Peterson Decl., Ex. 16.) As such, its
10 duty to preserve evidence had attached at least as early as that
11 date. See In re Napster, Inc. Copyright Litig., 462 F. Supp. 2d
12 1060, 1067 (N.D. Cal. 2006) ("As soon as a potential claim is
13 identified, a litigant is under a duty to preserve evidence which
14 it knows or reasonably should know is relevant to the action.").
15 As Defendant also notes, Plaintiff has not submitted a
16 declaration from Cecil or any other evidence to show that Winters
17 was simply mistaken about the email's existence. (See Reply at

18
19 responses to the RFPD No. 93-98" and that "[i]n it, Plaintiff
20 states that it has produced everything in its possession, which it
21 has." (Taillieu Decl. ¶ 19.) Exhibit 6 is an excerpt from Cecil's
22 deposition (and a duplicate of Exhibit 5), however, not a discovery
23 response. (See Taillieu Decl., Exs. 5, 6.) But in any event,
24 Defendant acknowledges that Plaintiff has averred that it has
25 conducted a diligent search and produced everything in its
26 possession responsive to those RFPs. (Mem. Contempt Mot. at 5.)

27
28 ⁷Winters testified that this incident occurred in the first
half of 2014 (Peterson Conf. Decl., Ex. 13 at 118-19), and some
evidence shows that the incident occurred around April 2014:
Defendant submitted an email that Cecil apparently drafted on April
2, 2014 (but did not send), stating that he had been "[o]n a call"
with a Canon representative and lawyer and that the lawyer had
"ended up on the wrong [web]site" and "asked if we made googles
[sic]" (Peterson Reply Decl., Ex. 19).

1 11.) As such, Plaintiff has either violated the December 2 Order
2 by failing to produce the Winters email or it has deleted it in
3 violation of its duty to preserve relevant evidence.

4 3. PowerPoint Presentation

5 Rachel Hodges testified at her deposition that during her
6 internship with Plaintiff in the summer of 2008, she created a
7 PowerPoint presentation that "outlined all of the reasons behind
8 why [the brand name Oculu] would make sense" and then presented
9 it to Cecil, Plaintiff's president.⁸ (Mem. Contempt Mot. at 5;
10 Peterson Decl., Ex. 2 at 46-47 (Hodges's testimony).) Defendant
11 contends that this document is responsive to RFP No. 74 (Mem.
12 Contempt Mot. at 5), which requested "[d]ocuments concerning
13 [P]laintiff's selection of the 'Oculu' mark" (see Nov. 11, 2014
14 Peterson Decl. Supp. Def.'s Mot. Compel, Ex. A at 58), and was
15 the subject of the Court's December 2 Order (Mem. Contempt Mot.
16 at 5). In that Order, the Court granted Defendant's motion to
17 compel responses to 63 RFPs, including RFP number 74, and it
18 specifically ordered that "if as to a particular RFP Plaintiff
19 has performed a diligent search and reasonable inquiry and has
20 concluded that it does not have any responsive documents in its
21 possession, custody, or control, it must so state in a
22 supplemental written response." (Dec. 2, 2014 Order at 3.)

23 Plaintiff contends that it did not violate the Court's
24

25 ⁸Although Hodges testified that her internship was in the
26 summer of 2008 (Taillieu Decl., Ex. 16 at 24), Plaintiff contends
27 it was in 2009 (Opp'n Mot. Contempt at 11) and submitted a portion
28 of Cecil's deposition testimony in which he stated that he thought
her internship was in 2009 (Taillieu Decl., Ex. 5). Whether the
internship took place in 2008 or 2009, however, is not relevant to
the resolution of this motion.

1 December 2 Order because Hodges's PowerPoint presentation is not
2 in its custody, possession, or control. (Opp'n Mot. Contempt at
3 4-5.) In support, Plaintiff notes that in her deposition, Hodges
4 "refused to say categorically" that "such presentation was on
5 Plaintiff's computers." (Id. at 4.) But although Hodges's
6 testimony on this point was somewhat equivocal, she eventually
7 indicated that she had probably worked on a company desktop.
8 (Peterson Decl., Ex. 2 at 48 (Hodges testifying, "I don't
9 remember if I had my own computer or if . . . [Cecil] gave me
10 one," but then stating, "I think he gave me one" and "I think I
11 was working on a desktop").) Thus, the fact that Hodges was
12 unsure of whether she used a company computer or her own fails to
13 conclusively establish that the PowerPoint presentation was not
14 in Plaintiff's control.

15 Plaintiff also contends that Cecil testified that Hodges had
16 worked on her own laptop during her internship, and that a search
17 of Plaintiff's computer system failed to uncover the PowerPoint
18 file. (Opp'n Mot. Contempt at 5.) But the portion of the
19 deposition transcript Plaintiff cites to support those assertions
20 does not show any such testimony. (See Taillieu Decl., Ex. 5.)
21 Rather, regarding the PowerPoint, Cecil testified only that he
22 remembered that Hodges had presented a list of names to him but
23 didn't remember any PowerPoint presentation. (Id.) Plaintiff's
24 argument therefore fails.

25 Thus, Plaintiff has produced no persuasive evidence showing
26 that it has complied with the Court's December 2 Order requiring
27 that Plaintiff respond to RFP number 74 or aver that a diligent
28 search was conducted and no responsive document was found. As

1 such, Plaintiff is in violation of the Court's December 2 Order.⁹

2 III. Some Sanctions Are Warranted

3 Defendant asks the Court to sanction Plaintiff by precluding
4 it from "offering any argument, evidence, or testimony" relating
5 to "alleged 'confusion' from an attorney of a client," "its free
6 trial customers" and "paid subscriptions, or its conversion of
7 free trial customers to paid customers," and "its actual damages
8 theory (namely that Defendant's conduct allegedly caused a
9 reduction in free trials and paid conversions), including but not
10 limited to its expert['s] . . . theory on 'Actual Damage.'" (Mem. Contempt Mot. at 23-24.) Defendant also asks the Court to
11 preclude Plaintiff from offering testimony, including expert
12 testimony, "relating to the creation of the 'Oculu' name." (Id.
13 at 13.)

15 Defendant's requested sanction is too harsh. An order
16 precluding any argument, evidence, or testimony regarding those
17 issues would have the effect of collapsing Plaintiff's case,
18 which is a severe penalty and is not warranted here. Cf. United
19 States ex rel. Wiltec Guam, Inc. v. Kahaluu Constr. Co., 857 F.2d
20 600, 603 & n.5 (9th Cir. 1988) (dismissal, default judgment, and
21 sanction orders taking party's allegations as established and
22 _____

23 ⁹Defendant submitted as an exhibit Plaintiff's supplemental
24 responses to Defendant's various discovery requests, but it appears
25 that the page or pages containing Plaintiff's supplemental response
26 to RFP number 74 were omitted. (See Peterson Decl., Ex. 1
27 (Plaintiff's third supplemental responses to first set of RFPs,
28 which includes page 23, showing RFP number 72, and then skips to
page 27, showing response to RFP number 83).) Plaintiff has not
argued or submitted evidence showing that it averred that it
conducted a diligent search of its records but that the PowerPoint
file could not be located.

1 awarding judgment on that basis are "the most severe penalty" and
2 authorized only in "extreme circumstances"). Plaintiff has now
3 produced much of the evidence at issue, including the Excel
4 spreadsheet, information from the MySQL database, and sign-up
5 emails (see Peterson Conf. Reply Decl., Ex. 22 at 592, 597
6 (Cecil's testimony that information from MySQL database and sign-
7 up emails were provided to Defendant); Taillieu Decl. ¶ 24, Ex.
8 11 (Excel spreadsheet)), and nothing shows that Plaintiff's delay
9 in producing the evidence "impair[ed] [Defendant's] ability to go
10 to trial or threaten[ed] to interfere with the rightful decision
11 of the case," see Fay Ave. Props., LLC v. Travelers Prop. Cas.
12 Co. of Am., No. 3:11-cv-02389-GPC-WVG, 2013 WL 3746107, at *9-10
13 (S.D. Cal. July 15, 2013) (finding terminating sanctions
14 unwarranted when plaintiff remedied deficiencies in discovery and
15 defendant failed to show prejudice). As such, the Court should
16 decline to issue an order precluding Plaintiff from introducing
17 any argument, evidence, or testimony regarding customer
18 confusion, the creation of its name, and conversion or retention
19 of customers.

20 In the alternative, Defendant asks the Court to find that it
21 is "entitled to an adverse inference that the free trial and
22 conversion documents and data that Plaintiff did not timely
23 produce would not support, and would in fact contradict, the
24 conclusions and estimates proffered by Plaintiff and its damages
25 expert." (Mem. Contempt Mot. at 24 (emphasis in original).)
26 Courts have held under Rule 37(b) that "evidentiary preclusion is
27 a harsh sanction that generally is not imposed where the failure
28 to provide discovery was either substantially justified or

1 harmless." FormFactor, Inc v. Micro-Probe, Inc., No. C-10-03095
2 PJH (JCS), 2012 WL 1575093, at *2 (N.D. Cal. May 3, 2012)
3 (alteration and internal quotation marks omitted); see also Fed.
4 R. Civ. P. 37(c)(1) (evidentiary sanctions not warranted if
5 failure to provide information under Rule 26(a) "was
6 substantially justified or is harmless").

7 Evidentiary sanctions are not warranted based on Plaintiff's
8 failure to timely produce the MySQL database, Excel spreadsheet,
9 and sign-up emails. Defendant contends that it was prejudiced by
10 Plaintiff's late disclosure of those documents because it was
11 "not possible for Defendant to review the documents in any
12 meaningful way" before Cecil's deposition "in order to question
13 [him] about them." (Mem. Contempt Mot. at 7.) Defendant further
14 contends that it was unable to conduct follow-up discovery
15 regarding those documents because discovery closed the week
16 before they were produced. (Id. at 7-8.) But as Plaintiff
17 points out (Opp'n Mot. Contempt at 3, 9), Judge Carter's
18 scheduling order specifically stated that "[a] deposition which
19 commences five (5) days prior to the discovery cut-off may
20 continue beyond the cut-off date, as necessary" (July 21, 2014
21 Scheduling Order at 2). Moreover, on March 2, 2015, the day
22 after Plaintiff produced the documents, Plaintiff's counsel
23 stated at Cecil's second deposition,

24 we understand that these documents might require the
25 further questioning of some of the witnesses that have
26 been already produced, including Mr. Cecil. To the
27 extent that it is necessary, . . . we are willing to make
28 those witnesses available again

1 (Peterson Conf. Reply Decl., Ex. 22 at 525; see also Taillieu
2 Decl. ¶ 26.) Defendant, however, never availed itself of that
3 opportunity, which complied with Judge Carter's scheduling order
4 and likely would have cured any prejudice from Plaintiff's late
5 disclosure.¹⁰

6 Plaintiff's failure to earlier produce information from the
7 MySQL database appears to have been harmless for two additional
8 reasons. First, the database likely does not reflect an accurate
9 number of free-trial signups. Plaintiff's chief technology
10 officer, Winters, testified that he was unsure whether the MySQL
11 database would "track a conversion from free to paid versus
12 someone that may sign up as paid initially" and that "it's just
13 the same record in the database, and it just rolls from trial to
14 paid and then a dollar amount attached with the billing cycle."
15 (Peterson Conf. Decl., Ex. 13 at 53.) Cecil similarly testified
16 that the database "will keep track of that customer, but it
17 doesn't say this guy was in a free trial and now he's a paying
18 customer." (See Peterson Conf. Reply Decl., Ex. 22 at 593.)
19 Second, although the MySQL database showed all of Plaintiff's
20 current customers (see Peterson Conf. Decl., Ex. 13 at 53),
21 Plaintiff had already produced its Quickbooks data showing that
22

23 ¹⁰Defendant contends that the Excel document Plaintiff produced
24 "does not align with the document that Mr. Ardell described"
25 because it does not have "a different tab for each month," as
26 Ardell stated. (Reply at 6; Peterson Reply Decl. at ¶ 3.) But the
27 Excel document simply lists information from the sign-up emails,
28 which Plaintiff says it has now produced. In any event, had
Defendant availed itself of the opportunity to conduct further
depositions, it could have questioned Plaintiff's witnesses
regarding the Excel document and determined whether it was the
document Ardell had described.

1 same information.

2 But evidentiary sanctions are warranted based on Plaintiff's
3 failure to produce the Hodges PowerPoint presentation. Plaintiff
4 failed to submit any evidence showing that it responded to RFP
5 number 74 or averred that a diligent search was conducted and no
6 responsive document was found, as required under the December 2
7 Order. Moreover, Defendant reasonably contends that it was
8 prejudiced by Plaintiff's failure to produce the PowerPoint,
9 stating that given Hodges's "testimony that she thought 'Oculu'
10 was 'original' and 'different enough from Oculus,' her PowerPoint
11 presentation to Mr. Cecil likely contained information harmful to
12 Plaintiff as to why it chose 'Oculu' over 'oculus.'" (Reply at
13 13 (citation omitted).) Because nothing shows that Plaintiff's
14 failure to produce the PowerPoint presentation was substantially
15 justified or harmless, Defendant should be permitted to submit a
16 proposed jury instruction informing the jury of that failure and
17 instructing that it may draw an appropriate adverse inference on
18 that basis.

19 Sanctions are also warranted based on Plaintiff's failure to
20 produce the Winters email in response to Defendant's RFPs and the
21 December 2 Order, or alternatively, its failure to preserve that
22 email in anticipation of this litigation. See Fed. R. Civ. P.
23 37(b)(2)(A)(ii); Glover v. BIC Corp., 6 F.3d 1318, 1329 (9th Cir.
24 1993) (as amended) (district court has "inherent discretionary
25 power to make appropriate evidentiary rulings in response to the
26 destruction or spoliation of relevant evidence," including
27 ordering "exclusion of certain evidence"). Winters unequivocally
28 testified that a Canon representative sent an email to Cecil,

1 Plaintiff's president, and Winters concerning confusion about
2 Defendant's website and goggles, that he and Cecil discussed the
3 email, and that Cecil responded to it, either by phone or email.
4 Plaintiff has not provided any evidence, in the form of Cecil's
5 declaration or otherwise, that the email never existed. The
6 email sent to Cecil and Winters is relevant to prove or disprove
7 Plaintiff's claims that Defendant's adoption of the name Oculus
8 created confusion "within the industry and among consumers,
9 customers, and potential customers." (First Am. Compl. at 1.)
10 Moreover, Plaintiff has failed to show that its failure to
11 produce the email was substantially justified or harmless. As
12 such, Defendant should be permitted to submit a proposed jury
13 instruction informing the jury that Plaintiff failed to produce
14 the Winters email and that it is entitled to draw an appropriate
15 adverse inference on that basis.

16 Defendant has also requested its attorney's fees and costs
17 in bringing this motion. Rule 37 and the advisory committee
18 notes to it contemplate that an award of fees to the prevailing
19 party in a discovery dispute should be the norm. The advisory
20 committee notes explain that the language of the rule was changed
21 to reflect that sanctions must be imposed in certain
22 circumstances in order to stem "abuses occurring in the discovery
23 process." Fed. R. Civ. P. 37 advisory committee's note to 1970
24 amend. "[E]xpenses should ordinarily be awarded"; they should
25 not be given only when a party "acted justifiably in carrying his
26 point to court." Id. Thus, Defendant should be permitted to
27 submit an itemization of its costs, including attorney's fees, in
28 preparing and filing the portions of its motion pertaining to

1 Plaintiff's failure to produce the Winters email, Excel
2 spreadsheet, MySQL database, sign-up emails, and PowerPoint
3 presentation, and Defendant should be awarded that amount unless
4 Plaintiff can persuasively argue that all or part of it is not
5 justified.

6 IV. Spoliation of Evidence

7 Defendant contends that Plaintiff "may have engaged in
8 spoliation of evidence" because it "appears to have destroyed
9 documents relating to free trial signups and conversions" within
10 its MySQL database. (Mem. Contempt Mot. at 14.) Defendant
11 points to Winters's testimony, which shows that Plaintiff
12 "frequently purge[d] inactive customers" from the database "just
13 because it's a storage resource issue." (Peterson Conf. Decl.,
14 Ex. 13 at 55.)

15 Plaintiff contends that its deletion of data from its
16 database "is of no moment to the issue of how many free trials
17 were ever commenced on [its] site" because the database does not
18 show whether a paid subscription started as a free trial. (Opp'n
19 Mot. Contempt at 12; Peterson Conf. Decl., Ex. 13 at 53.) Thus,
20 Plaintiff argues, "no amount of data storage, purged or
21 otherwise, would allow Defendant to determine how many free
22 trials rolled over to paid subscriptions." (Opp'n Mot. Contempt
23 at 12-13.)

24 A. Applicable law

25 "Spoliation is the destruction or significant alteration of
26 evidence, or the failure to preserve property for another's use
27 as evidence in pending or reasonably foreseeable litigation."
28 Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216 (S.D.N.Y. 2003)

1 (internal quotation marks omitted); accord Reinsdorf v. Skechers
2 U.S.A., Inc., 296 F.R.D. 604, 625 (C.D. Cal. 2013). Once the
3 duty to preserve evidence attaches, a litigant or potential
4 litigant is "required to suspend any existing policies related to
5 deleting or destroying files and preserve all relevant documents
6 related to the litigation." Napster, 462 F. Supp. 2d at 1070.
7 The district court has the inherent authority to impose sanctions
8 based on the spoliation of relevant evidence, including
9 evidentiary sanctions and adverse-inference instructions. Med.
10 Lab. Mgmt. Consultants v. Am. Broad. Cos., Inc., 306 F.3d 806,
11 824 (9th Cir. 2002); Glover, 6 F.3d at 1329.

12 B. Discussion

13 Although Plaintiff does not dispute that it deleted
14 information from its database during this litigation, including
15 information about expired free-trial accounts (see Peterson Conf.
16 Reply Decl., Ex. 22 at 597 (Cecil's testimony that Plaintiff
17 deleted data relating to free-trial signups "two weeks ago")),
18 sanctions are nevertheless unwarranted, see Reinsdorf, 296 F.R.D.
19 at 626 ("The bare fact that evidence has been altered or
20 destroyed does not necessarily mean that the party has engaged in
21 sanction-worthy spoliation." (internal quotation marks omitted)).
22 As an initial matter, nothing indicates that Plaintiff destroyed
23 relevant evidence with the intent of keeping it from Defendant,
24 as opposed to simply purging data to maintain space on its
25 server. (See Peterson Conf. Decl., Ex. 13 at 55 (Winters's
26 testimony that Plaintiff "frequently purge[s] inactive customers
27 just because it's a storage resource issue"); Peterson Conf.
28 Reply Decl., Ex. 22 at 596 (Cecil's testimony that retaining data

1 from free trials "would be a huge cost expense")); see Napster,
2 462 F. Supp. 2d at 1066-67 ("a party's motive or degree of fault
3 in destroying evidence is relevant to what sanction, if any, is
4 imposed").

5 Moreover, Defendant has failed to show that it was
6 prejudiced by Plaintiff's actions. See Reinsdorf, 296 F.R.D. at
7 627 ("for the court to issue sanctions, the absence of the
8 evidence must be prejudicial to the party alleging spoliation of
9 evidence'" (quoting Victor Stanley, Inc. v. Creative Pipe, Inc.,
10 269 F.R.D. 497, 531 (D. Md. 2010))). Even if no data had been
11 purged from the database, it likely would not reflect an accurate
12 number of free-trial signups because, as discussed in Section
13 III, Winters and Cecil both testified that the database does not
14 show whether its paying customers had initially signed up for a
15 free trial. (Peterson Conf. Decl., Ex. 13 at 53; Peterson Conf.
16 Reply Decl., Ex. 22 at 593.) And Plaintiff has already produced
17 its Quickbooks data, which show all of its customer accounts.
18 Because Defendant has therefore suffered no material prejudice,
19 the Court should deny Defendant's request for sanctions based on
20 the alleged spoliation of evidence.

21 V. Waiver of Privilege Based on Failure to Produce Privilege

22 Log

23 Defendant contends that Plaintiff's failure to produce a
24 privilege log "constitutes a waiver of privilege." (Mem.
25 Contempt Mot. at 19.) It contends that its counsel requested a
26 privilege log from Plaintiff "[o]n numerous occasions" (id.) but
27 that Plaintiff did not produce one; its counsel instead stated
28 that he "confirm[ed] that there are no privileged communications

1 that are responsive to any document requests" (Peterson Decl.,
2 Ex. 8 (Jan. 16, 2015 email from Plaintiff's counsel)). Defendant
3 notes that it has submitted discovery requests "relating to
4 Plaintiff's first awareness of Defendant; its communications with
5 third parties about Defendant, its products, or this lawsuit; its
6 prosecution of its trademark application; and its press releases
7 mentioning Plaintiff" and that "[i]t is not credible that
8 Plaintiff's only communications regarding [those subjects] were
9 with non-attorneys." (Mem. Contempt Mot. at 19.) Defendant asks
10 the Court to find that Plaintiff "waived any and all privilege"
11 and order Plaintiff to produce "its written communications with
12 former or current counsel relating to its trademark application,
13 its decision whether to enforce its alleged trademark rights, its
14 demand letter to Defendant, the allegations in its Complaints in
15 this case, and its press releases relating to this litigation."
16 (Id. at 24.)

17 In its Opposition, Plaintiff contends that it produced a
18 privilege log in response to the instant motion – apparently on
19 the same day it filed its Opposition – and that Defendant
20 therefore "suffered no prejudice." (Opp'n Mot. Contempt at 13;
21 Taillieu Decl., Ex. 20 (privilege log dated Mar. 9, 2015).)
22 Plaintiff argues that "the only privilege documents withheld were
23 communications between lawyers and clients related to (1)
24 trademark prosecution and (2) instant litigation." (Opp'n Mot.
25 Contempt at 14; see also Taillieu Decl., Ex. 20.) In reply,
26 Defendant contends that it suffered prejudice from the late
27 production of the privilege log because it was "produced after
28 the close of discovery, when there is no opportunity to ask

1 witnesses about any of the entries or learn the identity of any
2 unknown individuals on the log." (Reply at 23.) Defendant
3 further argues that the log is "flawed" because it does not list
4 certain communications, such as those with attorneys at the time
5 the Oculu trademark was filed, and because one of the three
6 entries lists a date range of "12/8/2013 - 5/8/2013" and is
7 therefore "nonsensical." (Id.; Taillieu Decl., Ex. 20.)

8 Under Federal Rule of Civil Procedure 34(b)(2)(A), "the
9 party to whom [a production request] is directed must respond in
10 writing within 30 days after being served." Rule 26(b)(5)(A)
11 provides that, when claiming privilege, a party must

12 (i) expressly make the claim; and (ii) describe the
13 nature of the documents, communications, or tangible
14 things not produced or disclosed--and do so in a manner
15 that, without revealing information itself privileged or
16 protected, will enable other parties to assess the claim.

17 In analyzing how Rule 34 and Rule 26(b)(5) interact, the
18 Ninth Circuit in Burlington Northern & Santa Fe Railway Co. v.
19 U.S. District Court for the District of Montana, 408 F.3d 1142,
20 1149 (9th Cir. 2005) (as amended), held that "boilerplate
21 objections or blanket refusals inserted into a response to a Rule
22 34 request for production of documents are insufficient to assert
23 a privilege." But the Ninth Circuit rejected a "per se waiver
24 rule that deems a privilege waived if a privilege log is not
25 produced within Rule 34's 30-day time limit." Id. Instead, the
26 Ninth Circuit instructed district courts to use the 30-day period
27 of Rule 34 as a default guideline and "make a case-by-case
28 determination" under the following factors:

1 [(1)] the degree to which the objection or assertion of
2 privilege enables the litigant seeking discovery and the
3 court to evaluate whether each of the withheld documents
4 is privileged (where providing particulars typically
5 contained in a privilege log is presumptively sufficient
6 and boilerplate objections are presumptively
7 insufficient); [(2)] the timeliness of the objection and
8 accompanying information about the withheld documents
9 (where service within 30 days, as a default guideline, is
10 sufficient); [(3)] the magnitude of the document
11 production; and [(4)] other particular circumstances of
12 the litigation that make responding to discovery
13 unusually easy (such as . . . the fact that many of the
14 same documents were the subject of discovery in an
15 earlier action) or unusually hard.

16 Id.

17 Although a close call, here the Burlington factors together
18 do not weigh in favor of finding waiver.¹¹ The first factor –
19 the degree to which the assertion of privilege enables the
20 litigant to evaluate whether each of the withheld documents is
21 privileged – is neutral. Plaintiff’s three privilege-log entries
22 could certainly be more detailed: two state only that they are
23 “[e]mails regarding prosecution of lawsuit” from “various” at
24

25 ¹¹Defendant failed to address the Burlington factors, which
26 also weighs against a finding that Plaintiff waived its privilege
27 objection. See Best Buy Stores, L.P. v. Manteca Lifestyle Ctr.,
28 LLC, No. 2:10-cv-0389-WBS-KJN, 2011 WL 2433655, at *6 (E.D. Cal.
June 14, 2011).

1 counsel's office to "various" at Plaintiff, without listing any
2 names or other identifying information (Taillieu Decl., Ex. 20),
3 and one of those two entries lists an invalid date range (id.
4 (listing dates of emails as "12/8/2013 - 5/8/2013")).
5 Nevertheless, it is clear that Plaintiff's assertion of privilege
6 is limited to emails with its counsel regarding Plaintiff's
7 trademark application and this lawsuit. Indeed, as Plaintiff
8 points out (Opp'n Mot. Contempt at 13-14), many of Defendant's
9 descriptions in its own privilege log are similarly brief (see
10 Taillieu Decl., Ex. 21). As such, this factor is essentially
11 neutral. See Koninklijke Philips Elecs. N.V. v. KXD Tech., Inc.,
12 Nos. 2:05-cv-01532-RLH-GWF, 2:06-cv-00101-RLH-GWF, 2007 WL
13 631950, at *5 (D. Nev. Feb. 26, 2007) (finding no waiver when log
14 attached to party's opposition to motion to compel identified
15 "email messages between [party] and its counsel" even though it
16 did "not provide information as to the dates of the various email
17 communications or the recipients of the communications"); Carl
18 Zeiss Vision Int'l Gmbh v. Signet Armorlite Inc., Civil No. 07-
19 cv-0894-DMS (POR), 2009 WL 4642388, at *4 (S.D. Cal. Dec. 1,
20 2009) (finding that log listing "legal advice of counsel" for
21 certain patents, although devoid of "particulars," was
22 "sufficient to render the first [Burlington] factor neutral").

23 The second Burlington factor, however, weighs in favor of
24 waiver. Plaintiff apparently did not produce its privilege log
25 in response to any of Defendant's discovery requests, instead
26 waiting until March 9, 2015, almost two weeks after discovery
27 closed. During discovery, by contrast, Plaintiff's counsel
28 informed Defendant that he had "confirm[ed] that there are no

1 privileged communications that are responsive to any document
2 requests." (Peterson Decl., Ex. 8 (Jan. 16, 2015 email from
3 Plaintiff's counsel).) Contrary to Plaintiff's claims, its late
4 disclosure of the privilege log prejudices Defendant because it
5 is now precluded from testing the assertion of privilege through
6 discovery. See Bullion Monarch Mining, Inc. v. Newmont USA Ltd.,
7 271 F.R.D. 643, 649 (D. Nev. 2010) (second Burlington factor
8 weighed in favor of waiver when privilege log was produced seven
9 months after close of discovery).

10 The third Burlington factor, the magnitude of document
11 production, weighs somewhat against waiver of Plaintiff's
12 attorney-client privilege. Plaintiff contends that it has
13 produced over 10,000 pages of data "as well as countless other
14 files made available to the Defendant online." (Taillieu Decl.
15 ¶ 5.) Further, according to Plaintiff's privilege log, it seeks
16 to withhold only emails between counsel and Plaintiff. (Id., Ex.
17 20); McKeen-Chaplin v. Provident Sav. Bank, FSB, No.
18 2:12-cv-03035 GEB AC, 2015 WL 502697, at *11 (E.D. Cal. Feb. 5,
19 2015) (finding that third Burlington factor weighed against
20 waiver when party had produced 12,000 pages of documents and
21 sought to withhold only three).

22 The fourth factor, the particular circumstances of the
23 litigation that make responding to discovery unusually easy or
24 unusually hard, is also neutral. Plaintiff argues that it is
25 difficult to locate responsive documents because it is a "small
26 organization" without "any centralized computer system."
27 (Taillieu Decl. ¶¶ 31-33.) As a result, Plaintiff argues, it
28 must "often rely[] on other individual's [sic] memory as to where

1 certain documents are," and employees are more likely to work on
2 their own computers without saving documents to the company's
3 current system. (Id. ¶¶ 32-33.) But as Defendant argues (Reply
4 at 1), Plaintiff's small size should also make it easier for it
5 to locate documents responsive to Defendants' discovery requests.
6 Indeed, Plaintiff's office is apparently physically quite small,
7 and only a few people work there. (See Peterson Conf. Reply
8 Decl., Ex. 23 at 58-59 (Cecil testifying that Plaintiff had few
9 shareholders, three employees, and two independent contractors),
10 78-79 (Cecil describing size of office).) Thus, this factor
11 weighs neither for nor against waiver.

12 On balance, therefore, the Burlington factors appear to be
13 in equipoise. But given that most of the documents listed on the
14 log appear to discuss this litigation and thus their production
15 would be particularly prejudicial to Plaintiff, a finding of
16 waiver is not warranted. See Vieste, LLC v. Hill Redwood Dev.,
17 No. C-09-04024 JSW (DMR), 2010 WL 4807058, at *9 (N.D. Cal. Nov.
18 18, 2010) (finding that "it would be well within this Court's
19 discretion to order a waiver of all documents that appear for the
20 first time on [d]efendants['] [new] privilege log" but providing
21 additional opportunity for defendant to argue why waiver should
22 not apply "in light of the fact that some of the documents appear
23 to discuss this litigation, and thus their production may be
24 particularly prejudicial to [d]efendants' position"); see also
25 Burlington N., 408 F.3d at 1149 (noting that "factors should be
26 applied in the context of a holistic reasonableness analysis").
27 Defendant's request should therefore be denied, or Plaintiff
28 should be ordered to produce a more detailed log, listing for

1 each document "(a) the attorney and client involved, (b) the
2 nature of the document, (c) all persons or entities shown on the
3 document to have received or sent the document, (d) all persons
4 or entities known to have been furnished the document or informed
5 of its substance, and (e) the date the document was generated,
6 prepared, or dated." In re Grand Jury Investigation, 974 F.2d
7 1068, 1071 (9th Cir. 1992). The Court can then make a case-by-
8 case determination concerning production.

9 **RECOMMENDATION**

10 IT ACCORDINGLY IS RECOMMENDED that the District Judge issue
11 an order (1) accepting this Report and Recommendation,
12 (2) granting in part Defendant's motion for evidentiary
13 sanctions, and (3) granting Defendant's request for attorney's
14 fees in an amount equal to its costs and fees in preparing,
15 serving, and filing the portions of its March 2, 2015 motion and
16 reply pertaining to Plaintiff's failure to produce the Winters
17 email, Excel spreadsheet, MySQL database, sign-up emails, and
18 Hodges PowerPoint presentation.

19
20 DATED: May 8, 2015



JEAN ROSENBLUTH
U.S. MAGISTRATE JUDGE